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No. 232.

Brief of Stang & Stang

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THE JOSEPH SCHLITZ BREWING COMPANY
v.
THE UNITED STATES.

No. 232,
October Term, 1900.

Statement of Case, Assignment of Error and Argument for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE JOSEPH SCHLITZ BREWING COMPANY, Appellant,
v.
THE UNITED STATES. } No. 232.

STATEMENT OF CASE, ASSIGNMENT OF ERROR, AND ARGUMENT FOR APPELLANT.

Statement of Case.

This is an appeal from the judgment of the Court of Claims refusing drawback under § 25 of the act entitled "An Act to reduce the revenue and equalize duties on imports and for other purposes," approved October 1, 1890 (1 Supp. R. S. 862; 26 Stat. L. 617), re-enacted as § 22 of the Act of August 28, 1894 (2 Supp. R. S. 313; 28 Stat. L. 551), as follows:

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles, a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties:

"*Provided*, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained.

"*And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided.

"That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

The claimant was a brewer at Milwaukee, Wisconsin, and manufactured and exported bottled beer, using imported hops, barley, bottles and corks, and paying duties upon all of them.

The court has given judgment for the drawback upon the hops and barley, and has denied payment of the drawback upon the bottles and corks on the ground that these were not materials used in the manufacture of the bottled beer exported.

Assignment of Error.

For error, appellant says that the court erred in holding that the bottles and corks used in the manufacture of bottled beer for export were not materials used in the manufacture of bottled beer in the United States, and in rendering judgment against the claimant.

Argument.

The findings of the Court of Claims show that the Treasury Department, in 1886, by formal decision under the then existing drawback law (R. S. § 3019), allowed drawback (Rec. 6) upon the imported bottles and corks used in the manufacture of bottled beer for export, and that this continued the official ruling of the Treasury Department until October 28, 1890 (p. 7), while drawback continued to be paid until as late as March 24, 1893 (p. 5). There is thus contemporaneous executive authority for the claimant's position, antecedent to the change of ruling whereby the right was denied.

The findings of the Court of Claims summarize the process used in brewing, dividing it into nine different steps. It then finds that the manufacture of beer for bottling for export differs from manufacture for domestic use, both in the selection of materials and the conduct of the process. Finding VII is as follows:

"The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use both because the materials must be selected with greater care, and the process must be conducted differently, in order that the bottled product may keep without change under varying conditions of climate, temperature, position, and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization."

The court then finds specifically the several differences in the process of manufacturing beer for domestic use and for bottling for export, going into various details of the manufacture. The finding concludes with the following statement as to the resultant product:

"The quality of the beer prepared for bottling when in barrels prior to bottling differs from the keg beer at the same stage in the fact that the keg beer has more albuminoids in it, and these give it a bread-like taste, described as palate fullness, and increase its foam-holding capacity. This is recognized as a valuable quality in keg beer, and the absence of this quality is recognized as a detriment, unavoidable in beer bottled for export because of the necessity for eliminating the albuminoids."

The court then finds that, after the beer is manufactured, additional steps are necessary in the case of bottled beer for export, including that of bottling and the distinct act of pasteurizing. This consists in raising the temperature of the beer after bottling carefully to about 150° for about an hour, for the purpose of killing living yeast cells. It is an essential step for beer bottled for export.

These findings are in ultimate effect that the bottles and corks are in contemplation as a part of the finished product of manufacture, beginning with the selection of the materials and continuing throughout the process of manufacture; that bottled beer for export is a different article from beer for domestic use, generally sold in kegs; that the beer brewed for bottling for export is an incomplete product until it is united with the bottle and cork in the manufacture known as bottled beer; that the beer made for this purpose is more expensive and the product less palatable than ordinary keg beer and consequently is not marketable except as bottled beer and that in that completed form it undergoes still another process of manufacture.

For these reasons the bottles and corks, as well as the hops and barley, are to be considered as "materials used in the manufacture" of the article known as bottled beer.

The question is thus seen to be of the application of words of known meaning to the facts of the case. Whether the words of the statute shall receive the construction thus demanded must depend on the definition of the word "materials," when read in the light of the purpose designed by this statute and of the revenue system fixed by other statutes in *pari materia*. We shall maintain:

1. That the necessary purpose of this act requires the construction claimed.

2. That the construction claimed is the only interpretation which construes this act in consonance with the other acts on the same subject.

The Purpose of this Act.

The object of the drawback law has been delared in several judicial decisions. In Campbell *v.* United State, 107 U. S. 407, this court said (p. 413):

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country—articles which are not sold or consmued in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case."

To similar effect is the definition given in Tide Water Oil Co. *v.* United States, 171 U. S. 210, where this court said (p. 216):

"The object of the section was evidently not only to build up an export trade, but to encourage manufactures

in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

The application of this idea to the present case is very simple. The American brewer wishing to export to to China meets in Chinese markets his German competitor. Beer can be sent there only as bottled beer, the findings show. For this product, hops, barley, bottles and corks are alike essential. German hops, barley and bottles are for sale at a lower price than American hops, barley and bottles. In competition in the Chinese market, the American brewer can not use American materials on account of the higher cost. Any increase in price would destroy the possibility of gaining the market. If he tries to purchase German barley, hops and bottles, he is met at the American custom-house by a protective tariff duty. Without a drawback, he must give up the market, since his German competitor has no such tariff handicap. The tariff is upon all three articles; all are alike essential to the complete manufacture of the exported article. The Treasury Department and the Court of Claims admit that he is relieved of his handicap to the extent of the tariff duty upon the barley and hops. They maintain, however, that the law, although designed to place him on an equality with his German competitor, still leaves him burdened with the duty on the bottles. The corks are in like case, differing only in the fact that both the German and American brewer must import them from Portugal. The German may pay no duty or may receive a drawback; the American pays a duty and receives no drawback, under the existing decisions.

Thus a burden is imposed upon American exporting manufacturers by our protective policy. Congress passes

a law in broad terms designed to relieve manufacturers of this burden; the Treasury Department and the Court of Claims, not denying the object, declare the act futile *quoad hoc*.

The Court of Claims frankly accepts this position, saying (Rec. 10):

"The true constituents of a purely and strictly protective law must be that the American manufacturer shall manufacture from American products for the American market, and thereby help the American producer as well as himself. But the overproduction of modern machinery has of late years overstocked the home market, and Congress have sought by appropriate legislation to bring foreign markets within the reach of the American manufacturer. To that end the legislative policy has been to allow the home manufacturer to manufacture his articles out of imported materials coming into the country practically duty free. It is manifest that if this favorable legislation is intended to put the American manufacturer on an equal footing with his foreign competitors in foreign markets, it must be as broad as the articles which he manufactures, or, rather, as broad as the imported materials which he uses, so that anything and everything which enters into cost of production shall be absolutely free from the additional cost of custom duties.

"In the case now before us it is manifest that the manufacturer was compelled either to use bottles manufactured in this country or to import bottles upon which he had paid duties. As a matter of fact he resorted to the latter alternative. He claims that these bottles are materials used in the manufacture of bottled beer; and it is but just to say that he shows that this beer is manufactured expressly for bottling and for exportation; that it can not be preserved and exported in any other way, and that from one point of view the bottle is as much an element of the intended product as the peculiar kind of beer which it contains. The manufacturer maintains that these duties will preclude him from competing in foreign markets with foreign brewers, contrary to what he believes to be

the legislative intent, because he can not manufacture this kind of beer for exportation without bottles, and can not afford to pay duties on bottles when his competitors do not."

But having come thus far, the court is unwilling to accept the statute as an apt expression of the legislative purpose and declares that "the legislation of Congress has been imperfect and incomplete," concluding that the words of the statute are insufficient to include the bottles and corks as materials of the manufacture.

It is shown by the findings that the beer contained in bottled beer for export is not of itself a completed article of manufacture, that the inspection and the several steps of the manufacture all imply the bottle, that the beer brewed for bottling is not marketed unbottled and that, after bottling, a separate step in the process is taken. Surely, when it is admitted that legislation is "imperfect and incomplete" without this inclusion, these facts bring the bottles and corks within the statutory terms of "materials used in the manufacture of" bottled beer for export.

It may fairly be assumed that when Congress passes a general law, in pursuance of a general policy, a construction should not be adopted which will defeat that policy unless the terms of the act positively require it. Especially will this be the case when the course of legislation *in pari materia* requires the broader construction to harmonize with other laws.

The Course of Legislation.

The general industrial policy of this country, framed for domestic purposes, is the preservation of the home market for home manufacturers. But the drawback law

is not the only statute framed to avoid the incidental imposition of burdens upon foreign trade because of this policy.

Under Rev. Stat. § 2971, merchandise imported and deposited in a bonded warehouse may be withdrawn by the owner for exportation without payment of duties. A Canadian brewer could bring his bottled beer to New York, deposit it there in a bonded warehouse, sell it on the New York Produce Exchange for export in immediate competition with American brewed beer and then export it without payment of any tax to the United States on bottles and corks or other materials. His American competitor, if the Treasury Department and the Court of Claims be correct, would have to pay the import duty on the bottles and corks, an absolutely essential part of the completed article.

If § 3019 and its statutory successors now are to be read as a part of the same financial and industrial system, the American brewer must be put on an equality with his Canadian competitor by giving him a drawback on all the imported materials of the completed article.

Under Rev. Stat. § 2977, if merchandise upon which duties have been paid is left in a bonded warehouse and then exported, the duties will be refunded. The Canadian brewer selling to South America, in competition with the American brewer, would have a drawback of the duties paid upon his entire product, bottled beer; but the American brewer, say the Treasury Department and the Court of Claims, can have no drawback on his bottles and corks. Surely such a construction fails to read the two statutes as consistent parts of a complete legislative system.

Where use is made of either of these two sections, 2971 or 2977, there is no American manufacture. It is therefore an essential to the encouragement of American

manufacture for export—a development of the statutory policy of protection—to put the domestic manufacturer in a position at least equal to that of the foreign manufacturer. This can not be done if he has to pay duty on his bottles and corks.

There is another law designed for the same purpose as the drawback law, to permit the manufacture in this country of articles of export from materials of foreign production, when these are necessary. Under § 9 of the act of August 28, 1894, (28 Stat. L. 548; 2 Supp. R. S. 309, re-enacted as § 15 of the act of July 24, 1897, 30 Stat. L. 207; 2 Supp. R. S. 707; the former an extension of § 10 of the act of Oct. 1, 1890, 26 Stat. L. 614; 1 Supp. R. S., 858) articles manufactured of imported materials subject to duty may be manufactured in a bonded manufacturing warehouse without payment of duty and then exported, remaining duty free. This legislation was designed to encourage American manufactures. If the claimant's brewery had been made a bonded manufacturing warehouse for the manufacture of beer exclusively for export, the bottles and corks would have been imported without payment of duty and exported equally duty free.

Section 22 of the act of 1894 (§ 25 of the act of 1890) is intended to accomplish the same object in another way, by refunding on exportation the duties already paid. This purpose should be carried out to the same extent under the one as under the other statute. But the construction adopted in this case makes the remedy under § 22 incomplete as compared with that under § 9. Every reason exists why they should be of equal extent. Section 9 is designed for large establishments, operated exclusively for exportation. Section 22 permits the same privileges to be shared by every manufactory in the country and goods are made under it both for domestic

use and for export, under the same roof. It is capable of indefinite extension. The two sections are different ways of accomplishing the same purpose and should be construed as granting alike freedom from import duty to articles not entering into domestic consumption.

All the statutes cited are designed to prevent the protective system from being a restraint upon export trade. They should all be construed together as integral and consistent parts of the same system. All are so construed and operated except the drawback section in the particular here complained of. This can be brought into harmony only by allowing a drawback as now claimed.

Authorities Cited in Opposition.

In the opinion of the court below, several cases are cited in opposition to appellant's claim. Other authorities relied upon by counsel below will doubtless be cited here.

The first to be considered is that of Wheeler *v.* United States (75 Fed. Rep. 654). It is true that that was a claim under the same statute as this for drawback upon bottles and corks used in manufacturing bottled beer for export. But the facts presented in this case and here chiefly relied on did not there appear, any more than they did in the Treasury Department when the adverse decision was made in 1893. The sole reliance was upon the fact that the beer was made, bottled and exported. The decision of the court was based upon a definition of the word "materials" by this court in United States *v.* Allen (163 U. S. 499). The reasons on which the decision was founded were not given, nor was it shown how the language used in this court applied to the case.

The first important fact shown here but not shown in the Wheeler case, is that beer brewed for bottling is not, apart from the bottle, a completed manufacture. It is found not only that the bottle is contemplated both in

the selection of the materials and in all the steps of manufacture, but also that it is only when the materials making the beer are put into the bottle and corked, appearing as bottled beer, that a completed product first appears. Neither did it appear in that case that the bottled beer underwent a further process of manufacture after bottling.

As the decision in Wheeler *v.* United States was made on an incomplete record, so also was it based on an unwarranted implication from the decision of this court in United States *v.* Allen, 163 U. S. 499, cited by the Court of Claims. That case has no relation to this question. By the tariff act of 1883 (22 Stat. L. 511) coal was taxed at 75 cents a ton and, in the same paragraph, drawback of this amount was allowed on imported coal used on sea-going vessels. The drawback section of the act of 1890 (on which this suit is based) contains a proviso "that the drawback on any article allowed under existing law shall be continued at the rate herein provided." In that part of the act of 1890, paragraph 432 (26 Stat. L. 600), providing for a tariff on coal, the duty was continued at 75 cents per ton, but no drawback was provided. This court held that the provision in the act of 1890 continuing "drawback on any article allowed under existing law" did not continue the drawback on coal, that being repealed through the omission of the drawback provision from the re-enactment of the paragraph fixing the tariff.

This conclusion was strengthened by the consideration that the drawbacks allowed under § 25 of the act of 1890 related to materials entering into manufactured articles and (p. 503) "not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product." It is at once seen that this has no application to the pending

case. The foundation of the claim in this case is that the bottle is one of the materials from which bottled beer is manufactured. Bottled beer is not a raw material like coal. The materials entering into bottled beer are those on which drawback is here claimed; hops, barley, bottles and corks. A critical examination of the case of United States *v.* Allen not only destroys it as authority for this case, but shows that, since the case of Wheeler *v.* United States rested upon it as its sole support, that case can have no weight.

In Beadleston *v.* United States, 104 Fed. Rep. 295, the Wheeler case was followed, although some evidence as to steaming was produced. The facts shown in the pending case as to the separate manufacture of beer for bottling did not appear there, and the opinion of the court certainly implies that such proof would have made a difference in its conclusions, saying:

"I think on full consideration that the article is essentially the beer, without reference to the bottle; that the bottle is not a material part of the identity of the beer or of its quality or marketable identity as beer."

In the present case it is shown that the article is essentially bottled beer and not beer apart from the bottle; that there is reference to the bottle throughout the manufacture and that the quality and marketable identity of the beer is as bottled beer and that beer without the bottle is a different article of manufacture.

We have already cited the case of *Tidewater Oil Co.* v. *United States*, 171 U. S. 210, as supporting the general principles relied on in this case.

There the making of boxes from imported shooks was discussed and conclusions reached which definitely support the present contention. The court there said (p. 216):

"Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. * * *

"The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank."

It appears by the findings in this case (Rec. 7, 8), that the particular beer which is manufactured for bottling for export is only used for the particular purpose of bottling, not possessing qualities valued in keg beer, and that the process of manufacture is not completed when this beer is put into barrels, preparatory to bottling. It is brewed only for bottling and is completed only when bottled. It is not claimed that putting the beer into the bottles is a complete and separate manufacture, but it is claimed, since the bottle is contemplated from the beginning of the manufacture, since all the processes vary in brewing beer for the keg and for bottling, since the beer produced is not used without the bottle, and since, after the bottling itself, a separate process of manufacture follows while the beer is in the bottle, that the manufacture of bottled beer is a different manufacture from the manufacture of beer for use from the keg and that the bottle and cork, while themselves finished products of one manufacture, are integral materials of the manufactured article. We therefore confidently rest the decision of this case upon the principle announced by this court in the case just cited.

Conclusion.

This case differs from most of the cases coming before this court from the Court of Claims in one most important aspect. These generally relate to executed matters, such as claims for damages for breach of contract, or to matters affecting but a limited circle of Government employees, such as claims of army and navy officers or of classes of civil employees. They are for additional grants from the public treasury to those already in receipt of compensation for services rendered; they involve on the part of the claimants no large public interests and their decision can have no effect on the industrial prosperity of the country.

This claim is of a class in which the jurisdiction of the Court of Claims has not been widely sought, but which is of living concern to the great manufacturing interests of the country. A decision of this case upon broad principles rather than upon the technicalities of interpretation, will have a valued effect upon the constantly expanding export trade.

It will exhibit to those concerned in the industrial development of the country that the true construction of the laws of Congress is based upon a consideration of the legislative purpose and that where the object of the law is the development of trade, that, and not the immediate collection and retention of the utmost present revenue, is the chief concern of judicial interpretation.

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